



**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1979

No. 79-591

MARGARET MARKETA NOVAK,

Petitioner,

vs.

HARRY NOVAK,

Respondent.

**RESPONDENT'S BRIEF IN
OPPOSITION FOR PETITION FOR
A WRIT OF CERTIORARI**

PHILIP L. NADLER
1901 Avenue of the Stars
Suite 1630
Los Angeles, California 90067
(213) 277-2833

Attorney for Respondent

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Petitioner's Petition for a Writ of Certiorari
should be denied for the following reasons:

1. Under "Questions Presented" (page 2 of Petitioner's Petition), Petitioner uses the word "dismissal" to describe the action taken against her Motion to Set Aside the Interlocutory Judgment of Dissolution of Marriage. Petitioner's Motion was denied, not dismissed, under a long-established procedure followed in the State of

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California in deciding motions under California Code of Civil Procedure §473.

2. Petitioner's appendage of the California Court of Appeals decision is a misstatement of that Court's decision. Petitioner has omitted the first six pages of the Court of Appeal decision. Respondent has appended hereto as his Appendix A, the full decision by the California Court of Appeals. Pages 2 to 6, inclusive, of the Court of Appeal decision are necessary to a full and complete understanding of the proceedings in the trial court. Those six pages are an accurate summary by the California Court of Appeals of the trial court proceedings, wherein custody of the minor child was awarded to Petitioner, husband was ordered to pay child support, and the community property of the parties was divided, and wife waived spousal support. It also sets forth the fact that the wife is the one who filed the Motion to set aside the Interlocutory Judgment of Dissolution of Marriage, under C.C.P. 473 on the grounds that the stipulation and Judgment was the result of a mistake.

3. A complete reading of the California Court of Appeal decision strongly indicates that the wife was relying on matters which were not true. For example, wife claimed that at the time of the Stipulation, she believed that the agreement provided for fair spousal support, equal division of community property and child support awards. The California Court of Appeals found "the record upon which the trial court in the instant action relied is devoid of support for wife's contentions." (See pages 8

2.

and 9 of the California Court of Appeals decision.) "Wife further contends that the community property was not equally divided because of improper evaluation of husband's business. This argument is contrary to the record." (See pages 10 and 11 of California Court of Appeals decision.)

4. Wife would have this court believe that her claim of physical incapacity and mental duress were ignored by both the trial court and the California Court of Appeals. The California Court of Appeals found "the trial court considered the issue, and denied the motion based upon the parties' affidavits." (See page 14 of California Court of Appeals decision.)

5. It is difficult to ascertain exactly how Petitioner was denied due process under either the Fifth Amendment or the Fourteenth Amendment. On page 13 of her Petition, Petitioner states that the California Court of Appeals failed to decide whether or not §473 is the proper remedy by which one overturns a Judgment entered as a result of mistake and duress. This issue was never presented to the Court of Appeals. Wife chose California Code of Civil Procedure section 473 under which to make her Motion, and which she now attacks. (See page 7 of California Court of Appeals decision.) Her major contention was that the Court abused its discretion in denying her motion to vacate the judgment.

6. Presumably, Petitioner is arguing that she was denied procedural due process. Procedural due process means notice and an

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opportunity to be heard. "Ingrained in our concept of due process is the requirement of notice. Notice is sometimes essential, so that the citizen has the chance to defend charges. Notice is required before property interest is disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act."

Lambert v. California (1958)
355 U.S. 225, 78 S.Ct. 240,
243, 2 L.Ed.2d 228, 231;

Twining v. New Jersey (1908)
211 U.S. 78, 29 S.Ct. 14, 20,
53 L.Ed. 97, 111.

Nowhere does Petitioner point out in what manner the courts of the State of California denied her notice and an opportunity to be heard. The record is quite clear that she chose to make the original motion, and therefore gave the notice. There is no contention that at any hearing subsequent to the notice of motion, Petitioner was denied an opportunity to be heard.

CONCLUSION

The record is absolutely clear that Petitioner was not denied due process at any stage of the proceedings. Petitioner was

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present at every court proceeding, either in person or through counsel. Petitioner's Petition for a Writ of Certiorari does not state in what manner Petitioner was denied notice or an opportunity to be heard. Furthermore, it is not clear in what manner California Code of Civil Procedure §473 denies her these rights. For these reasons, the Petition should be denied.

Respectfully submitted,

PHILIP L. NADLER

Attorneys for Respondent

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

In re the Marriage of MARGARET MARKETA
and HAROLD NOVAK

MARGARET MARKETA NOVAK,)
) 2d Civil No.
Appellant,) 53865
vs.)
) (LASC No.
HAROLD NOVAK,) D861098)
)
Respondent.)
)

Court of Appeal-Second Dist.

FILED

APR 23 1979

CLAY ROBBINS, JR. Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Christian E. Markey, Jr., and Harry T. Shafer, Judges. Affirmed.

Marvin M. Mitchelson and Penelope Mercurio for Appellant.

Samuel Z. Winnikoff for Respondent.

Appellant (Wife) appeals from the trial court's order denying her motion to set aside the interlocutory judgment of dissolution of marriage.

Wife and respondent (Husband) were married for approximately 27 years at the time Wife filed for dissolution of marriage on January 13, 1975. Four children were born of the marriage. Only Leo David Novak, born on January 11, 1965, was a minor at the time the petition of dissolution was entered on September 27, 1976. The judgment incorporated the terms of the stipulated agreement that had been filed on July 22, 1976. The stipulation was recited in court. Husband and Wife were each represented by separate counsel. In addition, the trial court explained the terms of the stipulation and asked Husband and Wife if they understood and accepted the stipulations. Both parties answered in the affirmative.

The agreement provided in pertinent part that:

"1. Custody of the minor child, LEO DAVID NOVAK, born January 11, 1965, is hereby awarded to Petitioner, with the right of reasonable visitation to the Respondent. Reasonable visitation is defined as such visitation as may be recommended by the Devereaux School where said minor child is presently a resident student. Both parties have the right to apply to the Court and the Court reserves jurisdiction for modification of visitation in the event either party shall deem it appropriate to bring such a motion.

"2. Respondent shall pay for the support and maintenance of said minor child the sum of approximately \$1,500.00 per month, which shall be paid directly to the Devereaux School, dependent upon their billing and such payments shall commence with the month of July, 1976, and shall be made within a reasonable period after receipt of billing therefrom, by Respondent, and shall continue until further Order of Court. As additional child support, Respondent shall pay all reasonable medical and dental expenses incurred by or on behalf of said minor child.

"3. The parties have agreed to the division of community property and have stipulated to the distribution thereof and that it be deemed an equal division. Pursuant thereto, the Court hereby distributes to Petitioner as her sole and separate property [certain] items. . . .

"To equalize distribution of community property, Respondent will pay to Petitioner the sum of \$300,000.00. Respondent is ordered to pay that amount as follows:

"(a) The balance of \$100,000 certificate of deposit, after first deducting therefrom attorneys' fees and costs as is hereafter provided.

"(b) Cash received upon the sale of the residence at 595 Chalette Dr., Beverly Hills, California, from escrow, up to the then balance, if any, of the entire \$300,000.00.

"(c) In addition to any provisions above, Respondent shall pay to Petitioner the sum of

\$35,000, on or before October 31, 1976.

"(d) The entire balance (whatever is necessary to make up a total of \$300,000.00) shall be paid to Petitioner by Respondent on or before July 21, 1977.

"4. All remaining community property is hereby awarded to Respondent as his sole and separate property. In addition, Respondent is ordered to hold and save Petitioner harmless from any liability, from any encumbrance, or payment due or owing, or to become due or owing, with reference to the 1975 Cadillac automobile bearing license plate M ANGEL hereinabove referred to.

"5. The community property herein awarded to Respondent as his sole and separate property includes, but is not limited to, [certain items]."

Further, Wife waived all right to spousal support.

On March 25, 1977, Wife filed her notice of motion to set aside the interlocutory judgment of dissolution of marriage. Wife contended that her agreement to the stipulation was the result of mistake. The mistake was caused by her inability to understand her rights at the time she agreed to the stipulation. She contended, by affidavit,¹ emotional and physical stress and

1. Wife submitted an affidavit at the time of the pendency of the dissolution proceedings that contained
(continued on p. A-5)

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duress exercised by Husband deprived her of her ability to understand her rights. Husband submitted counteraffidavits denying her allegations.

The trial court denied her motion on August 24, 1977. This appeal follows.

Wife's major contention is that the trial court abused its discretion in denying her motion to vacate the judgment. This contention has no merit.

Wife filed her motion under California Code of Civil Procedure section 473. Under this section, a court may "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Application for such relief . . . must be made within a reasonable time, in no case exceeding six months, after such judgment, order, or proceeding was taken." (Code Civ. Proc., § 473.)² "Relief under Code

1 (continued from previous page)

the same allegations that her affidavit in support of her motion to set aside the judgment contained. Wife contended that Husband made several threats against her life. Further, she underwent pelvic surgery in February 1976, six months before agreeing to the stipulation. Wife presented the affidavit of a physician who submitted that Wife told him she was under emotional stress because Husband threatened her.

2. Wife's first argument on appeal supports the timeliness of her motion to set aside the
(continued on p. A-6)

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of Civil Procedure section 473 is entrusted to the sound discretion of the trial court. In the absence of a clear showing of abuse, its ruling will not be disturbed on appeal. The burden rests on the adverse party to show as a matter of law, that such discretion has been abused." (In re Marriage of Simmons, 49 Cal. App.3d 833, 837; citations omitted.)

In the instant case, Wife has not met the burden described. We find no abuse of discretion by the trial court. Wife contends that by virtue of emotional and physical stress and duress imposed by Husband, she was incapable of understanding her rights at the time she agreed to the stipulation. As a consequence of the incapacity she suffered, she entered into the stipulation which she now feels was inequitable.

3/

As indicative of her incapacity, Wife contends that at the time of the stipulation

2. (continued from previous page)

judgment. Husband concedes this issue and urges that the only issue on appeal is whether the trial court properly exercised judicial discretion in denying Wife's motion.

3. Wife cites several cases to support the contention that incapacity is grounds to vacate a judgment under Code of Civil Procedure section 473. None of the cases cited bears any factual similarity to the instant case. Wife cites Buck v. Buck, 126 Cal. App.2d 137, where the court set aside a decree where the aggrieved was ignorant of California law and could not speak English;

(continued on p. A-7)

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she mistakenly believed that the agreement provided for fair spousal support, equal division of community property, and child support awards. The record of the hearing of the proceedings concerning the stipulation is clearly contrary to Wife's present claims of her previous inability to understand her rights. The record upon which the trial court in the instant action relied is devoid of support for Wife's contentions. Wife contends that she believed the stipulation provided for spousal support. The trial court asked Wife on at least four separate occasions if she realized she was giving up spousal support for good. Wife always responded yes and she understood.^{4/}

3. (continued from previous page)

Kesselman v. Kesselman, 212 Cal. App.2d 196, where the petitioner suffered a pralytic stroke; and Hambrick v. Hambrick, 77 Cal. App.2d 372, the aggrieved was not represented by counsel during settlement negotiations and his claims of being nervous and distraught were uncontradicted.

4. The following is a quote from the record demonstrating the extreme caution exercised by the trial court in assuring itself that Wife was aware of her rights and what she was relinquishing.

"THE COURT: . . . You understand, however, that you are giving up alimony. You will never have alimony, or support, whatever they may call it.

"THE PETITIONER: I understand I am giving up alimony, your Honor.

(continued on p. A-8)

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Wife further contends that the community property was not equally divided because of improper evaluation of Husband's business.5/

4. (continued from previous page)

"THE COURT: And support.

"THE PETITIONER: And support.

"THE COURT: Aside from what I am reading into the record. Is that right?

"THE PETITIONER: Yes, your Honor.

"THE COURT: You have given that thought.

"THE PETITIONER: Under the circumstances.

"THE COURT: I don't want any 'under the circumstances.'

"THE PETITIONER: Yes, I understand it and I --

"THE COURT: In other words, you had a chance. I didn't want to rush. That's why I continued this matter until today. Give you a chance to think about it. [par.] All right. Is that what you want?

"THE PETITIONER: That's what I want."

5. Wife does not contend that Husband concealed assets.

This argument is contrary to the record. Wife hired an independent accounting firm to 6/ conduct an evaluation of the community property.

6. The following is testimony by Elliot Rosman, C.P.A., who conducted the evaluation.

"Q. Will you, as best you can recall, tell the court what instructions you received?

"A: The thrust of the instructions had to do with the fact that, based upon the information furnished to you and furnished to me by [appellant], that essentially we were to conduct our investigation of this matter as though we were conducting a fraud investigation; that we were to examine in substantial detail areas that were mentioned as possible, sources of hidden funds, hidden assets, improper expenditures, et cetera.

"Q: Were you told by [appellant] that she thought there was money that did not show on the books?

"A: Yes, sir.

"Q: Were you told by me that it was important we determine that?

"A: Yes, sir.

"Q: Did you do that which you believed necessary in order to determine that?

(continued on p. A-10)

The firm was advised to conduct its investigation as though it were investigating for fraud. Wife cannot claim that she was mistaken as to the value of the community property when she was responsible for setting the value. (See In re Marriage of Carletti, 53 Cal. App. 3d 989, 993.)

Wife further urges that she was mistaken in not requesting a provision for child support for Leo for those occasions when he is not at the Devereaux School. Leo is a resident of the school since he suffers from cerebral palsy and mental retardation. Husband pays child support

6. (continued from previous page)

"A: Yes, we did.

".

"Q: Did you do the best you could to determine what the value of the community property was?

"A. We certainly did.

"Q. Did I also ask you to determine the value of the business if at all possible?

"A: Yes, you did request that.

".

"Q: Did you do the best you can to do that?

"A: Yes, sir."

directly to the school. A request for child support at the time of the stipulation would not have been appropriate because Leo stays at Devereau School and Wife is not responsible for his care. When Leo resides with Wife, she can seek modification of child support. (See Civ. Code, § 4811, subd. (a); Singer v. Singer, 7 Cal. App. 3d 807.)

Wife urges that though it is found that she was not operating under a mistake in understanding her rights when she entered into the stipulation, she contends that her agreement was obtained by duress.^{7/} Wife's affidavit in support of this contention is countered by Husband's affidavit. The trial court considered the issue and denied the motion based upon the parties' affidavits. There is no basis for disturbing the determination of the trial court. (Weathers v. Kaiser Foundation Hospitals, 5 Cal. 3d 98, 108.)

Judgment affirmed.

NOT FOR PUBLICATION.

ASHBY, J.

We concur:

KAUS, P. J.

HASTINGS, J.

7. Wife's affidavit contains many allegations that Husband threatened her life. These allegations are denied by Husband in his counteraffidavit.